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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 RICHARD TYLER FRAZER,
11 Plaintiff,

12 v.

13 UNITED STATES OF AMERICA, *et al.*,
14 Defendants.

No. C08-5172RBL

ORDER ON
DEFENDANTS' MOTION
TO DISMISS AND
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT

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18 This matter is before the court on the Defendants' Motion to Dismiss [Dkt. #34], and on the
19 Plaintiff's Motion for Summary Judgment [Dkt. #36]. At issue is the liability of the United States Patent
20 and Trademark Office and four of its employees for their alleged negligence and other failures in
21 prosecuting a patent application filed by the Plaintiff.
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23 Defendants seek Dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction,
24 arguing that the USPTO and its employees cannot be sued under the Federal Tort Claims Act, 28 U.S.C.A.
25 §2671 *et seq.* Defendants argue that that Act does not waive the sovereign immunity of the United States
26 and its agencies and employees in engaging in discretionary functions, like processing a patent application.
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28 The FTCA's limited waiver of sovereign immunity does not apply to "any claim based on an act or
omission of an employee of the Government based upon the exercise or performance or the failure to

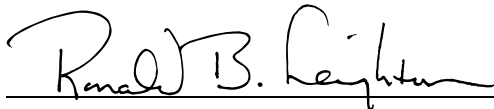
1 exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the
2 government.” See 28 U.S.C.A. §2680(a). Defendants argue that the core allegations of Plaintiff’s
3 complaint – that the USPTO and its employees were negligent in processing his patent application – fall
4 squarely into this “discretionary function” exception to the FTCA.
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6 Plaintiff does not rebut or address this argument in his Response to the Defendants Motion
7 (which is combined with his own Motion for Summary Judgement). Plaintiff instead recites his version of
8 the facts and outlines the negligence he claims occurred. [Dkt. # 36]. Nothing in this recitation suggests
9 that the acts and omissions complained of were anything but discretionary functions.
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11 The Defendants’ Motion to Dismiss for lack of subject matter jurisdiction [Dkt. # 34] is therefore
12 GRANTED. Plaintiff’s Motion for Summary Judgment is therefore DENIED. All other pending Motions
13 are DENIED as moot. Plaintiff’s complaint is DISMISSED.

14 IT IS SO ORDERED.

15 DATED this 3rd day of September, 2008.
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20 RONALD B. LEIGHTON
21 UNITED STATES DISTRICT JUDGE
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